

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

STEPHEN A. DOWNS, SR.,)
Plaintiff,)
)
v.) Civil No. 3:10-0661
ERIC K. SHINSEKI, Secretary, Department of)
Veteran Affairs,)
Defendant.)
)

MEMORANDUM and ORDER

On March 14, 2011, the Magistrate Judge issued a Report and Recommendation (Docket No. 22), to which the *pro se* plaintiff has filed timely Objections (Docket No. 23). Because this ruling relates to a dispositive motion, this court must review *de novo* any portion of the Report and Recommendation to which a specific objection is made. Rule 72(b), FED. R. Civ. P.; 28 U.S.C. § 636(b)(1)(C); *United States v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001); *Massey v. City of Ferndale*, 7 F.3d 506, 510 (6th Cir. 1993).

The Magistrate Judge recommended that the defendant's Motion to Dismiss be denied as to the plaintiff's claims under 42 U.S.C. § 1981, the ADEA, Title VII and the Rehabilitation Act, but that all other claims be dismissed. The plaintiff misinterprets the Magistrate Judge's Report and Recommendation by stating that he is not abandoning "his retaliation claims" and therefore objects to the dismissal of any retaliation claims "already pleaded." (Docket No. 23 at 2)

Claims

for retaliation under the four causes of action allowed to go forward would be included within claims asserted under those four causes of action and, therefore, are not dismissed under the

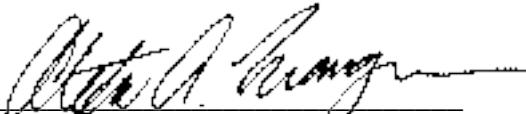
Magistrate Judge's recommended ruling. The plaintiff does not object to the Magistrate Judge's perception that the plaintiff has abandoned his claim under the ADA, and that is further reinforced by the plaintiff's filing of a proposed second Amended Complaint (Docket No. 24), which this court interprets as not including a claim under the ADA.

The plaintiff's Objections are **OVERRULED**. The Report and Recommendation is therefore **ACCEPTED** and made the findings of fact and conclusions of law of this court. For the reasons expressed therein and herein, it is hereby **ORDERED** that the defendant's Motion to Dismiss (Docket No. 18) is **DENIED IN PART**. Only the plaintiff's claims under the ADA are **DISMISSED WITH PREJUDICE**.

Even though the plaintiff's proposed second Amended Complaint (Docket No. 24) would require a motion to amend, in the interest of moving this case forward, and because the second Amended Complaint clarifies the plaintiff's claims, the court will allow it to be the prevailing pleading at this point. It is hereby **ORDERED** that the defendant shall respond to the second Amended Complaint (Docket No. 24) by May 6, 2011. This case is returned to the Magistrate Judge for further handling under the original referral Order.

It is so **ORDERED**.

Enter this 11th day of April 2011.



ALETA A. TRAUGER
U.S. District Judge